Supreme Court, U.S.
FILED

001149 DEC 1 - 2000

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

LEMBHARD G. HOWELL, SHERRY TIERNAN, ROBERT KUVARA, GORDON HOUGH, SHARON JOHNSTON, JOAN FOWLER, and BURTON KILLIAN, on their own behalf and on behalf of all other members of the class,

Petitioners,

v.

ALASKA AIRLINES, INC., a foreign corporation, doing business in the State of Washington,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION PRESENTED FOR REVIEW

Whether 49 U.S.C. §41713(b)(1) preempts plaintiffs' common law contract claims against the defendant airline when plaintiffs purchased airline tickets, were unable to use them, and the airline refused to refund unused tickets or permit their sale to other passengers.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs Below): Lembhard G. Howell, Sherry Tiernan, Robert Kuvara, Gordon Hough, Sharon Johnston, Joan Fowler, Burton Killian on their own behalf and on behalf of all other members of the class.

Respondent (Defendant Below): Alaska Airlines, Inc., a foreign corporation doing business in the State of Washington. Alaska Airlines, Inc. is a wholly owned subsidiary of Alaska Air Group.

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I. CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

A. Washington State Supreme Court No. 44441-7-I (Order Denying Review).

B. *Howell, et al. v. Alaska Airlines, Inc.*, 99 Wn.App. 636, 994 P.2d 901 (2000) (Published Opinion of Washington State Court of Appeals, Affirming Superior Court Order Granting Defendant's Motion to Dismiss).

C. Washington State Superior Court, King County, Cause No. 98-2-14930-2SEA (Order Granting Defendant's Motion to Dismiss).

D. United States District Court, Western District of Washington, at Seattle, Cause No. C98-980Z (Order Granting Plaintiff's Motion to Remand).

1. STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Plaintiffs seek review of the Washington State Court of Appeals Opinion entered March 6, 2000, which affirmed the trial court's dismissal of this case with prejudice. The Washington State Supreme Court denied Plaintiff's Petition for Review on September 5, 2000. 28 U.S.C. §1257 confers on this court jurisdiction to review on a writ of certiorari the orders of the state court in this action.

2. CONSTITUTIONAL PROVISIONS,

TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

A. 49 U.S.C. §41713(b)(1):

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. §40120(c):

A remedy under this part is in addition to any other remedies provided by law.

I. STATEMENT OF THE CASE

A. Procedure Below

On June 17, 1998 plaintiffs filed the complaint in this action in the Superior Court of Washington State, King County. Defendant has not yet answered.

On July 16, 1998 defendant removed this case to United States District Court, Western District of Washington at Seattle.

On September 21, 1998, upon plaintiffs' motion, the Honorable Thomas S. Zilly, United States District Court, entered an order remanding the case to King

County Superior Court.

On October 29, 1998, the Honorable Peter D. Jarvis, Washington State Superior Court Judge for King County entered an order granting defendant's motion to dismiss, dismissing the action with prejudice.

On November 20, 1998, plaintiffs filed their notice of appeal to the Supreme Court of Washington. The Supreme Court of Washington denied direct review and remanded the case to the Washington State Court of Appeals, Division I.

On March 6, 2000 the Washington State Court of Appeals, Division I filed its published opinion which upheld the trial court's dismissal with prejudice. *Howell, et al. v. Alaska Airlines, Inc.*, 99 Wn.App. 646, 994 P.2d 901 (2000).

On April 5, 2000 plaintiffs filed a Petition for Review in the Supreme Court of Washington.

On September 5, 2000, the Supreme Court of the State of Washington entered an order denying plaintiffs' petition for review.

B. Statement of Facts

Each plaintiff individually purchased airline tickets from defendant for travel on defendant's commercial airline. For various reasons, set out below, each plaintiff was unable to travel at the specified time according to their respective contracts with defendant.

Except for price, time of travel, and place of travel, the terms of each plaintiff's contract with defendant is identical.

Plaintiffs were unable to travel according to their respective contracts for various reasons:

1. Plaintiff Killian

Mr. Killian and his wife purchased tickets from defendant to travel from Seattle to Reno. Mr. Killian, who had coronary artery disease, was suddenly hospitalized after he had purchased the ticket and prior to their scheduled departure. He underwent surgery and was advised not to travel. Mr. Killian's wife requested a refund for their tickets, but defendant refused to reimburse the Killians.

2. Plaintiff Howell

Mr. Howell, an attorney, intended to travel from Seattle to Fairbanks, Alaska to represent his client at trial. He purchased tickets for himself, an associate and several witnesses. Days before the trial, Mr. Howell's client accepted an offer of settlement, and the trial was cancelled. Mr. Howell requested a refund of the tickets, which defendant denied.

3. Plaintiff Tiernan

Ms. Tiernan purchased tickets for her daughter to

travel from Los Angeles to Seattle, so her daughter could visit her. After her daughter was expelled from the school, Ms. Tiernan had no use for the tickets, and defendant refused to refund the purchase price of her tickets.

4. Plaintiff Kuvara

Mr. Kuvara, an attorney, purchased tickets for travel from Seattle to Sun Valley, Idaho, but was unable to travel when he was required to represent a client at a mandatory court hearing. Defendant refused to refund Mr. Kuvara's purchase price.

5. Plaintiff Hough

Mr. Hough purchased tickets for travel from Seattle to Anchorage, Alaska to attend his daughter's trial. When her trial date changed, Mr. Hough requested a refund from defendant, but his request was refused.

6. Plaintiff Johnston

Ms. Johnston purchased a ticket for her son to attend his grandmother's 90th birthday party. When he was unable to make the trip, Ms. Johnston requested a refund, which was denied.

7. Plaintiff Fowler

Ms. Fowler purchased a ticket for travel over Thanksgiving weekend to visit her son in Post

Falls, Idaho. When her son moved to western Washington a few days before Thanksgiving, she could no longer use the ticket and requested a refund, which was denied.

Plaintiffs' claims were based entirely on common law contract principles: (1) frustration of purpose/impossibility of performance, (2) illusory promises, (3) unconscionable substance of the contract, (4) unconscionable procedure, (5) breach of the implied duty of good faith and fair dealing, and (6) unjust and enrichment.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review by this Court should be accepted because a state court of last resort has decided an important federal question in a way that conflicts with two United States Supreme Court cases: *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995). This petition involves issues of substantial public interest that should be determined by this Court with respect to whether Congress intended to preempt plaintiffs' common law contract claims against an airline.

The Airline Deregulation Act (ADA), 49 U.S.C. §41713 (b)(1) reads:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. §41713 (b)(1) (1994) (Emphasis added).

Two Supreme Court cases have interpreted this statute. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) interpreted the "related to..." language, and American Airlines, Inc. v. Wolens, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) interpreted the "enact or enforce any law" language. In order to be preempted a claim must be enacted or enforced by a state law and the law must relate to price, route, or service of a carrier. In our case, plaintiffs' claims do not involve "enact[ing] or enforc[ing]" state law, as interpreted by Wolens, and plaintiffs' claims do not "relate[] to a price, route, or service" as interpreted by Morales.

A. Under Morales and its progeny, plaintiffs' claims do not relate to price, route, or service.

In Morales, attorneys general in four states sought to regulate the airline industry's method of passenger fare advertising by bringing a suit under state consumer protection statutes. Morales at 379. The

National Association of Attorneys General (NAAG) adopted standards governing the content and format of airline advertising. Id. Both the Department of Transportation (DOT) and the Federal Trade Commission (FTC) objected to the guidelines. Id. at 390. The court found that the consumer protection claims were preempted by the ADA because the claims "related to rates, routes, and services." Id. at 390. Morales, however, cautioned against a broad reading of its opinion:

> [W]e do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising . . . would similarly "relat[e] to" rates; the connection would obviously be far more tenuous. To adapt to this case our language in Shaw [v. Delta Airlines, Inc. 463 U.S. 85, 103, S.Ct. 2890, 77 L.Ed.2d 490 (1983)], "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect.

Id. at 390 (emphasis added).

When the Ninth Circuit Court of Appeals was confronted with West v. Northwest Airlines, Inc. 995 F.2d 148 (9th Cir. 1993), a case, like ours, based on common law contract claims, the Court held that:

> We believe that the state contract and tort

> laws under which West seeks relief are within that range of statutes too tenuously connected to airline regulations to trigger preemption under the ADA, what the Morales court called "borderline questions."

West at 151. Likewise, in our case, plaintiffs' common law contract claims are too tenuously connected to airline regulation to fall under ADA preemption.

In West, Mr. West was 'bumped' from a Northwest Airlines flight and brought a suit for breach of the covenant of good faith and fair dealing under Montana law seeking compensatory and punitive damages. Id. at 150. The Court held that Mr. West's contract claims for compensatory damages were not preempted, but that his punitive damages claim was preempted. Id.

The Court recognized that the federal regulations not only contemplate, but provide, that common law remedies under contract law may be pursued in the courts. Id. at 152. Said regulation provides that "the passenger may decline the payment and seek to recover damages in a court of law or in some other manner." Id. (emphasis added). The court upheld the airlines' practice of overbooking and bumping but held that common law contract remedies should be granted to Mr. West for damages resulting from the airline's policy. Id.

Similarly, in our case, plaintiffs do no seek to overturn defendant's "non-refundable" policies, but simply seek relief under contract remedies.

Applying common law contract principles to an airline's contract would not dictate or regulate its prices, routes, or services. While applying such principles may lead to indirect economic effects, such effects do not result in preemption:

> Indirect economic effects that alter an air carrier's incentives but do not dictate its choices with respect to price, route or service are not sufficient to cause preemption, unless those incentives are "tantamount to a compulsion."

Air Transport v. City and County of San Francisco, 992 F.Supp. 1149, 1182 (N.D.Cal. 1998).

Moreover, due to defendant's overbooking policy, defendant probably filled the seats purchased by plaintiffs with other passengers who paid full fare, so any indirect economic impact is minimal. However, because the trial court dismissed the action before discovery, defendants cannot claim there would be an economic impact by applying common law contract principles to the contract. Plaintiffs do not attempt to restrict or regulate Alaska's practices. They merely wish the airline to follow uniform, long-standing, common law contract principles and remedies.

Plaintiffs' claims are not "related to" ticket prices. Plaintiffs have not contested "the price" of the tickets they purchased. However, if a passenger is unable to fly and requests a refund, he should get it or be able to sell his ticket to another customer; defendant should be required to mitigate its damages and not benefit from unjust enrichment. Alaska's policy is a clear restraint on alienation of property -- it sells tickets for seats on its airplane to patrons, and yet does not allow the patrons to sell or even give the tickets to another person. If defendant is able to sell the passenger's seat to another passenger, defendant should have to reimburse the passenger the fare it received, less administrative costs. If the defendant could not fill the seat, absent another common law principle (i.e. frustration of purpose) the defendant should not be required to refund the purchase price.

B. Under Wolens, plaintiffs' claims do not involve Washington State's "enact[ment] or enforce[ment] of any law".

American Airlines, Inc. v. Wolens, supra, held that even though a claim may relate to rates, routes, or services, it is not preempted by the ADA unless the state "enacted or enforced" a law. Id. at 226. Consequently, even if this Court finds that plaintiffs' common law contract claims "relate to" defendant's rates, the claims

are not preempted unless the state "enacted or enforced" the law under which the claim was brought.

In Wolens, the plaintiffs sought remedies under a state common law breach of contract claim and a claim under the Illinois Consumer Fraud Act (ICFA) when American Airlines retroactively changed the terms of its frequent flyer program. Id. at 219. The Wolens Court held that while plaintiffs' ICFA claim was preempted by the ADA, their breach of contract claims were not. Id. at 226.

The Supreme Court recognized Congress' intent in enacting the ADA: "To ensure that the States would not undo federal deregulation with regulation of their own." Id. at 222. The Supreme Court held that state law contract remedies were not "state enactment or enforcement of law" which Congress preempted under the ADA:

> As persuasively argued by the United States, terms and conditions airlines offer and passengers accept are privately ordered obligations "and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [§]1305 (a)(1)." Brief for United States as Amicus Curiae 9.

Id. at 228-299

In our case, plaintiffs' common law contract claims confine the remedies to traditional contract remedies. Plaintiffs seek restitution – a well-established, uniform remedy. Lawrence P. Simpson, Simpson on Contracts, p.548 (1954).

Finally, the FAA's saving clause states that "a remedy under this part is in addition to any other remedies provided by law". 49 U.S.C. §40120 (c) (1994). Retention of this clause is further evidence that Congress intended to allow "state-law-based court adjudication of routine breach of contract claims". Wolens at 826. Reading the preemption clause and the saving clause together, the Court rendered a compromise: "[the two clauses] stop[] States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." Id. at 232-233. Therefore, relief is available for contract remedies as long as the remedy does not impose restrictive regulations. Under plaintiffs' contract claims, they do not seek injunctive or declaratory relief – the type of remedies which the Wolens Court seemed reluctant to grant.

C. Conclusion

For the reasons set forth above, this court should

accept review and reverse the Washington State Court of Appeals' affirmation of the trial court's Order granting Defendant's Motion to Dismiss.

DATED this 30th day of November, 2000.

Respectfully Submitted,

LEMBHARD G. HOWELL
WSBA #133
Attorney for Plaintiffs/Petitioners

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LEMBHARD G. HOWELL,	)	
	)	NO. C98-980Z
Plaintiff,	)	
	)	MINUTE
vs.	)	ORDER
	)	
ALASKA AIRLINES, INC.	)	
	)	
Defendant.	)	

The following Minute Order is made by direction of the court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Plaintiff's motion to remand, docket no. 7, is GRANTED. This case was removed pursuant to 28 U.S.C. §1441 alleging federal question jurisdiction. In general, a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). Plaintiff's state court complaint pled solely state law claims and did not raise issues of federal law on its face. Defendants rely on the "artful pleading" doctrine which allows courts under some circumstances to recharacterize

a plaintiff's state law claim as a federal claim. Hunter v. United Van Lines, 746 F.2d 635 (9th Cir. 1984), cert. denied, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985). Defendant contends that the asserted state law claims have been completely preempted under the Airline Deregulation Act ("ADA"). The ADA expressly preempts claims "relating to rates, routes, or services" of any air carrier. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). The Morales court interpreted the preemptive clause broadly. However, Morales left open the possibility that certain state law claims would not be preempted. West v. Northwest Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1993), cert. denied, 510 U.S. 1111, 114 S.Ct. 1053, 127 L.Ed.2d 374 (1994). The Court must consider whether the state law claims at issue have a reference to or a connection with the ADA. See Emard v. Hughes Aircraft Company, No. 96-56587, 1998 WL 510845 (9th Cir. August 20, 1998). The Court concludes that plaintiff's state law claims are not so closely related to matters governed by the ADA to require complete preemption. See American Airlines v. Wolens, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); Congress has

not clearly manifested an intent to preempt all state law claims. In re Air Disaster, 819 F.Supp. 1352 (E.D. Mich. 1993). As a result, the Court concludes that the issue of federal preemption is solely a defense, and that the case was not properly removed. Accordingly, the Court orders this case REMANDED to state court.

(2) The Court does not rule on defendant's related motion to dismiss, docket no. 9. Whether and to what extent plaintiff's claims are preempted should be resolved in state court.

(3) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 21st day of September, 1998.

BRUCE RIFKIN, Clerk

By/s/
Casey Condon
Deputy Clerk

Judge Donald Haley

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LEMBHARD G. HOWELL, et al.,	
Plaintiffs,	No. 98-2-14930-2SEA
vs.	
ALASKA AIRLINES, INC.,	ORDER GRANTING ALASKA AIRLINES' MOTION TO DISMISS
Defendant.	

This matter came before the Court on defendant Alaska Airlines' motion to dismiss pursuant to CR 12(b)(6). Having considered the arguments of both parties, the Court hereby grants the motion. The complaint fails to state a claim upon which relief can be granted. Based on the above finding, It Is Ordered: The action is dismissed with prejudice.

DATED: October 29, 1998

/s/
Hon. Peter D. Jarvis

PRESENTED BY:

/s/_____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEMBHARD G. HOWELL, SHERRY TIERNAN, ROBERT KUVARA, GORDON HOUGH, SHARON JOHNSTON, JOAN FOWLER and BURTON KILLIAN, on their own behalf and on behalf of all other members of the class,	NO.44441-7-1
Appellants,	DIVISION ONE
v.	PUBLISHED OPINION
ALASKA AIRLINES, INC., a foreign corporation, doing business In the State of Washington	FILED:
Respondent.	March 6, 2000

GROSSE, J. – Claims of airline passengers seeking a refund of unused, and explicitly nonrefundable, tickets

on the grounds of impossibility of performance, frustration of purpose, illusory promises, procedural and substantive unconscionability, breach of the duty of good faith and fair dealing, and unjust enrichment, are preempted under the Airline Deregulation Act of 1979 (ADA).[1] The order dismissing the appellants' complaint with prejudice is affirmed.

FACTS

The appellants each purchased tickets for air transportation from Alaska Airlines, Inc. (Alaska). It is undisputed that each ticket purchased was nonrefundable. The appellants for various reasons, were unable to use the tickets they had purchased.[2] In each instance, Alaska

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1 49 U.S.C. §41713(b)(1) (1994).

2 For example, appellant Howell, an attorney, had purchased a nonrefundable ticket for round-trip air transportation on Alaska between Seattle and Fairbanks, Alaska, to attend a trial in which a client was a party. The client settled her case and the trial was canceled, so Howell no longer needed transportation to Fairbanks. Howell also purchased a nonrefundable ticket on behalf of his wife for round-trip air transportation on Alaska between Seattle and Spokane. His wife became ill and was unable to travel on the date scheduled. Appellant Tiernan purchased two nonrefundable tickets for round-trip air transportation on Alaska between Seattle and Los Angeles. The tickets were for use by Tiernan's

refused the appellants' requests for refunds of the purchase price of their tickets.

Appellant Howell filed an action in King County Superior court against Alaska on behalf of himself and a class of persons who purchased nonrefundable airline tickets from Alaska and were refused refunds when they were unable to travel as planned. Howell alleged that the ticket contracts were void on the ground of frustration of purpose, impossibility of performance, illusory promises, substantive and procedural unconscionability, breach of the duty of good faith and fair dealing, and unjust enrichment. He also claimed that by refusing refunds Alaska violated the Consumer Protection Act.[3]

Alaska removed the action to federal court. The federal court, finding no subject matter jurisdiction,

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daughter who attended boarding school in Los Angeles. The daughter was expelled from boarding school before the scheduled travel dates and had no use for the tickets when the travel dates arrived. The remaining named appellants were similarly unable to sue their nonrefundable tickets for air transportation on Alaska for a variety of reasons.

3 RCW 19.86.

remanded the matter to state court. Howell filed an amended complaint, joining the other named appellants, and dropping the Consumer Protection Act claim.[4] Alaska filed a motion to dismiss pursuant to CR 12(b)(6), asserting three grounds for dismissal: the appellants' claims are preempted by the preemption provision of the ADA;[5] the appellants' claims are barred by the applicable statut of limitations; and the appellants' complaint fails to state a claim upon which relief can be granted, even if the claims are not preempted. The trial court granted the motion and dismissed the complaint with prejudice.

DISCUSSION

We review the dismissal of a claim under CR 12(b)(6) de novo.[6] We accept as true the allegations in the complaint and the reasonable inferences that may be drawn therefrom.[7] Dismissal is appropriate only if it

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[4] Although the action purports to be a class action, no class has yet been certified.

[5] 49 U.S.C. §41713(b)(1) (1994).

[6] Reid v. Pierce County, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998).

[7] Reid, 136 Wn.2d at 201.

appears beyond a reasonable doubt that no facts exist to justify recovery.[8]

By enacting the ADA, Congress deregulated domestic air transportation: the ADA includes a preemption provision designed "[t]o ensure that the States would no undo federal deregulation with regulation of their own[.]"[9] The preemption provision states that, except under circumstances not relevant here, "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [the ADA]."[10]

The United States Supreme Court has construed a predecessor preemption provision in the ADA on two occasions.[11] In the first opinion, Morales v. Trans World

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[8] Reid, 136 Wn.2d at 201.

[9] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)

[10] 49 U.S.C. §41713(b)(1).

[11] The predecessor provision prohibited states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier[.]" Former 49 U.S.C. App. §1305(a)(1). When

Airlines, Inc.,[12] the Court concluded that the words "relating to"[13] as used in the provision express a broad preemptive purpose.[14] In construing the breadth of the preemption, the Court adopted the same standard used to interpret the similarly-worded preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA).[15] That is, the ADA's preemption provision preempts "State enforcement actions having a connection with, or reference to, airline rates, routes, or services[.]'"[16] Thus, the Court held that state actions based on consumer protection laws, seeking to stop allegedly deceptive airline

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it reenacted the preemption provision as 49 U.S.C. §41713 (b)(1). Congress intended to make no substantive change. American Airlines, Inc. v. Wolens, 513 U.S. 219, 222-23 & n.1, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) (citing Pub. L. 103-272, § 1(a), 108 Stat. 745).

[12] Morales, 504 U.S. at 374.

[13] The corresponding words in the current statute are "related to."

[14] Morales, 504 U.S. at 383.

[15] 29 U.S.C. §1144(a).

[16] Morales, 504U.S. at 384 (quoting former 49 U.S.C. App. § 1305(a)(1)).

fare advertisements, were preempted by the ADA.

The Court again addressed the ADA preemption provision in American Airlines, Inc. v. Wolens.[17] That case involved a suit by members of the airline's frequent flyer program challenging the airline's retroactive changes in the terms and conditions of the program. The Court drew a distinction between actions seeking to enforce an airline's self-imposed obligations and actions seeking to enlarge or otherwise change the parties' bargain through application of state laws or policies external to the agreement. With respect to the former, the Court held that the ADA did not preempt suits seeking recovery solely for an airline's alleged breach of its own self-imposed undertakings, because "[a] remedy confined to a contract's terms simply holds parties to their agreemens[.]"[18] But, the Court held, the ADA's preemption provision stops states from imposing their own substantive standards with respect to an airline's rates, routes, or services.[19] The Court stated:

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[17] 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995).

[18] Wolens, 513 U.S. at 229.

[19] Wolens, 513 U.S. at 232-33.

"This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with nō enlargement or enhancement based on state laws or policies external to the agreement."[20] Read in conjunction with the ADA's savings clause,[21] the preemption provision "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated."[22] Accordingly, the Court held that the plaintiffs' actions was not preempted because the terms and conditions an airline offers and its passengers accepts, such as the terms and conditions of a frequent flyer program, are privately ordered obligations.

Under the ADA's preemption provision, and the Supreme Court's interpretation of it, courts have held

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[20] Wolens, 513 U.S. at 233 (footnote omitted).

[21] "A remedy under [the ADA] is in addition to any other remedies provided by law." 49 U.S.C. §40120© (1994).

[22] Wolens, 513 U.S. at 232-33.

various matters preempted. For example, a court held that a state law regulating the circumstances under which employers may require airline workers to submit to drug testing was preempted.[23] An action challenging, on state statutory and common law grounds, an airline's refusal to allow the plaintiff to advertise and sell to the general public tickets at discounted prices for flights on the airline was held preempted by the ADA. The court determined that resolution of the plaintiff's claims could potentially and improperly cause the rates for airline tickets in the state in which the action was brought to differ from those available in other states.[24] A passenger's claim that the airline breached its contractual obligation to transport him to his destination, arising out of the airline's refusal to allow him to board a flight after a layover due to the airline's failure to ask for photo identification at the point of original departure, was held preempted because

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[23] French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989).

[24] Illinois Corporate Travel, Inc. v. American Airlines, Inc., 682 F.Supp. 978 (N.D. III. 1988), aff'd, 889 F.2d 751 (7th Cir. 1989).

boarding procedures are "services" under the ADA and the airline's action was justified by government security directives. The court concluded that because the airline's defenses were provided by federal law, the passenger's contract claim could only be adjudicated by reference to law and policies external to the parties' bargain and was therefore preempted by the ADA.[25] By contrast, a plaintiff's breach of contract claim against an airline, arising out of the airline's failure to transport the plaintiff's brother, was held no preempted because the claim did not involve any enlargement or enhancement of the parties' bargain based on state laws or policies external to the agreement.[26]

In Blackner v. Continental Airlines, Inc.,[27] the plaintiff challenged the airline's policy of imposing a $60 surcharge for a lost ticket. The contract between the

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[25] Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998).

[26] Chukwu v. Board of Directors of Varig Airline, 880 F.Supp. 891 (D. Mass. 1995).

[27] Blackner v. Continental Airlines, Inc., 311 N.J. Super. 10, 709 A.2d 258 (1998), cert. denied, ____U.S.____, 119 S.Ct. 1034, 143 L.Ed.2d 42 (1999).

plaintiff and the airline explicitly authorized the surcharge. The court determined that the plaintiff was not seeking to enforce the contract, but was rather seeking to overturn it on the ground that the surcharge was barred by state law. This, the court determined, was precisely what the Supreme Court rejected in Wolens and Morales.[28] The court held that the claim was preempted because it sought to enlarge or enhance the parties' agreement based on state laws or policies external to the agreement that, according to the plaintiff invalidated the surcharge provision.[29]

Similarly, in Statland v. American Airlines, Inc.;[30] the court held that a passenger's challenge to the airline's 10 percent cancellation policy, on grounds of breach of fiduciary duty, violation of the state's consumer protection statute, conversion, and breach of contract, was preempted. The court concluded that canceled ticket refunds relate to price and accordingly held that the ADA prohibits states

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[28] Blackner, 709 A.2d at 260.

[29] Blackner, 709 A.2d at 260.

[30] Statland v. American Airlines, Inc., 998 F.2d 539 (7th Cir. 1993).

from regulating an airline's ticket refund practices either by common law or by statute.[31]

Based on the foregoing, we conclude that the appellants' challenge to Alaska's refusal to refund the price of a nonrefundable ticket is preempted by the ADA. As in Blackner, the contract between Alaska and each of the appellants authorized the airline to take the action now challenged – here, the refusal to refund the purchase price of the ticket. In their complaint, the appellants do not seek to enforce the contract according to its terms. Rather, they seek to have this action declared unlawful by application of state laws and policies external to the parties' agreement. In other words, the appellants are attempting to enlarge or enhance their agreements with Alaska based on the laws or policies of this state that are external to the agreements. Under the ADA, particularly as construed by the Supreme Court in Wolens, the appellants' claims are preempted. Thus, the trial court was correct in dismissing the appellants' amended complaint with prejudice. Accordingly, we affirm the trial court.

/s/ Gross, J.

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[31] Statland, 998 F.2d at 542.

WE CONCUR:

/s/ Agid, ACJ /s/ Coleman, J.

THE SUPREME COURT OF WASHINGTON

LEMBHARD G. HOWELL, SHERRY TIERNAN, ROBERT KUVARA, GORDON HOUGH, SHARON JOHNSTON, JOAN FOWLER, and BURTON KILLIAN, on their own behalf and on behalf of all other members of the class,	)	NO. 69542-3
Petitioners,	)	**ORDER**
v.	)	C/A NO. 44441-7-I
ALASKA AIRLINES, INC., a foreign Corporation, doing business in the State of Washington,	)	
Respondents.	)	

Department I of the Court considered this matter at its September 5, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of September, 2000. /s/ Richard P. Guy
CHIEF JUSTICE